No. 35497-1-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN ALEXANDER HANKINS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR STEVENS COUNTY

The Honorable Judge Jessica T. Reeves

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Ronald Reynolds reported a jet ski stolen. He later found what he believed was this jet ski for sale on Craigslist. Mr. Reynolds arranged to meet the seller, Benjamin Hankins. Mr. Hankins arrived at the meet-up location with a jet ski. Mr. Reynolds identified this jet ski as the one he reported stolen. Mr. Hankins was charged with one count of first degree trafficking in stolen property, a "1990 Yamaha BombardierJet Ski." Mr. Hankins asserted he legitimately purchased the jet ski.

At the jury trial held on the charge, Mr. Reynolds testified the name of the jet ski is "Sea Doo Bombardier," and he does not know its year. The jury was instructed on the lesser-included offense of second degree trafficking in stolen property. The to-convict instruction for this offense listed "stolen property," rather than the name of the jet ski allegedly trafficked. The jury convicted Mr. Hankins of the lesser-included offense of second degree trafficking in stolen property. Mr. Hankins now appeals, arguing there was insufficient evidence to support his conviction, or, in the alternative, that he is entitled to a new trial on this charge because of a defective to-convict instruction. Mr. Hankins also challenges defense counsel's failure to object to the inclusion of a prior out-of-state conviction in his offender score without a comparability analysis. Finally, in the event the State is the substantially prevailing party in this appeal, Mr. Hankins objects to appellate costs being imposed.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in finding Mr. Hankins guilty of second degree trafficking in stolen property, where the evidence was insufficient to prove the crime as charged in the Information.
2. The to-convict jury instruction for second degree trafficking in stolen property was defective because it allowed Mr. Hankins to be convicted of a crime not charged in the Information.
3. The trial court erred by including an out-of-state conviction in the calculation of Mr. Hankins' offender score without conducting a comparability analysis. Trial counsel was ineffective for failing to object to or alert the trial court to its comparability analysis requirement.
4. An award of costs on appeal against Mr. Hankins would be improper in the event that the State is the substantially prevailing party.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the trial court erred in finding Mr. Hankins guilty of second degree trafficking in stolen property, where the evidence was insufficient to prove the crime as charged in the Information.

Issue 2: In the alternative, whether the to-convict jury instruction for second degree trafficking in stolen property was defective because it allowed Mr. Hankins to be convicted of a crime not charged in the Information.

Issue 3: Whether Mr. Hankins was denied his right to effective assistance of counsel when his attorney failed to object to the inclusion of a prior out-of-state conviction in his offender score without a comparability analysis.

Issue 4: Whether this Court should deny costs against Mr. Hankins on appeal in the event the State is the substantially prevailing party.

D. STATEMENT OF THE CASE

In October 2016, Ronald Reynolds owned seven jet skis and several vehicles. (RP 16-18, 65). At around midnight on October 5, 2016, all of his vehicles were parked in front of his home in Spokane. (RP 16, 18, 47). The next morning, he noticed that a jet ski and trailer, previously hooked up to a vehicle he owned, were gone. (RP 18-19, 47). Mr. Reynolds reported the jet ski as stolen. (RP 19, 47, 73, 75, 87-89).

Three days later, Mr. Reynolds found what he believed was his jet ski for sale on Craigslist. (RP 19-23). He contacted the seller to inquire about the jet ski. (RP 20-21). Mr. Reynolds arranged to meet the seller in Stevens County. (RP 28-30, 54, 252-253). He also contacted law enforcement officers in Stevens County, who accompanied him to the meet-up location. (RP 29-32, 73-74, 76-78, 84, 95-96, 119-123).

According to Mr. Reynolds, when the seller arrived at the meet-up location, Mr. Reynolds recognized the jet ski and trailer as those missing from his home in Spokane. (RP 27-28, 31-33, 78, 80, 122). The registration numbers on the jet ski had been removed. (RP 24, 26, 34-35, 49-51, 108-109, 125-126, 239-240; Pl.'s Ex. 1). According to Mr. Reynolds, the registration numbers were present on the jet ski before it went missing. (RP 24, 26, 34-35, 49-51; Pl.'s Ex. 1).

A law enforcement officer arrested the Craigslist seller of the jet ski, later identified as Benjamin Hankins. (RP 32, 53, 76, 78-80, 122-123, 134, 255-256). At the time of his arrest, Mr. Hankins told law enforcement officers he purchased the jet ski in Spokane from a person named Jacob Brown. (RP 16, 78-79, 82, 98-101, 111, 124-125, 258-260, 266).

The State charged Mr. Hankins with one count of first degree trafficking in stolen property, alleging as follows:

> Benjamin Alexander Hankins in the County of Stevens, State of Washington, on or about October 8, 2016, did knowingly traffic in stolen property, to wit: 1990 Yamaha BombardierJet Ski . . . .

(CP 1-2).

After finding "the defendant is financially unable to obtain counsel without causing substantial hardship to the defendant or defendant's family[,]" the trial court appointed an attorney to represent Mr. Hankins at public expense. (CP 7, 13).

The case proceeded to a jury trial. (RP 6-355). Witnesses testified consisted with the facts stated above. (RP 15-274).

In addition, Mr. Reynolds testified no one had his permission to take the jet ski. (RP 19). He testified he does not know the year of the jet ski, and specifically, he does not know if it is a 1990 jet ski. (RP 65-66). Mr. Reynolds testified the name of the jet ski is "Sea Doo Bombardier." (RP 67).

Stevens County Sheriff's Office Sergeant Michael Gilmore, who accompanied Mr. Reynolds to the meet-up location with Mr. Hankins, testified "NCIC is a national criminal database . . . where warrants would go into, stolen vehicles, firearms, stolen firearms, things of that nature." (RP 70-72). He testified that in order to enter a stolen vehicle into the NCIC system, "normally we would have to - - show that the person owns that or has control of that vehicle." (RP 72). He testified the jet ski recovered "did . . . appear standardly admitted into the NCIC as a stolen vehicle." (RP 75).

Sergeant Gilmore testified this was Spokane's case, and that his office relied upon Spokane's investigation and assertion that the jet ski was stolen from Mr. Reynolds. (RP 87-91). Referring to this jet ski, he testified "Spokane had verified, with VIN numbers, that vehicle, according to their report." (RP 89).

Sergeant Gilmore testified he was able to confirm the jet ski recovered from Mr. Hankins at the meet-up location was the jet ski reported stolen by Mr. Reynolds:

> In addition to [Mr. Reynolds] personally saying, "Yes, this is my jet ski," pointing out on the trailer the modifications he had made, - - the fact that the WIN numbers had been removed from it - - It took a while of us digging through to find the - - not sure they're called a VIN number, I think they're called a HIN number, which is the hull identification number, on motor - - on boats - - we were able to locate that, down in the motor compartment somewhere.

(RP 80-81).

When called as a witness by Mr. Hankins, Sergeant Gilmore testified as follows:

> [Defense counsel:] Who owns [the jet ski]. Who's it registered to.
> [Sergeant Gilmore:] Because as far as I can tell it was owned by Mr. Reynolds.
> . . . .
> I matched the VIN number - - or the HIN number - - to confirm that was the jet ski . . . .
> - - that Spokane had listed as a stolen jet ski.
> [Defense counsel:] All right. But as to the owner.
> [Sergeant Gilmore:] They had Mr. Reynolds listed as their victim.
> [Defense counsel:] Are you saying that Spokane had the VIN on the ski?
> [Sergeant Gilmore:] That's my understanding.
> [Defense counsel:] Well, is - - I'm not asking your understanding. Do you know if Spokane had the VIN.
> [Sergeant Gilmore:] The Spokane report listed that vehicle as the stolen vehicle.
> [Defense counsel:] Do you have any of the Spokane information - -
> [Sergeant Gilmore:] I do not.

(RP 158-159).

Mr. Hankins testified in his own defense. (RP 218-267). He testified he purchased the jet ski on a street in Spokane from Jacob Brown. (RP 223-224, 226, 228-233, 235, 239, 264). He testified the registration numbers had been removed prior to his purchase of the jet ski. (RP 239-240; Pl.'s Ex. 1). He testified he believed the jet ski was a legitimate item to purchase. (RP 249). Mr. Hankins acknowledged he put the jet ski up for sale on Craigslist. (RP 242-246).

Mr. Hankins' mother testified that the day before the meet-up, Mr. Hankins arrived home to their house with the jet ski. (RP 184-188). She testified the registration numbers had been removed, and it did not appear that they had

been removed recently. (RP 187-188). She testified Mr. Hankins told her he purchased the jet ski in Spokane. (RP 188-189, 197).

Mr. Hankins' father also testified that the day before the meet-up, Mr. Hankins arrived home to their house with the jet ski. (RP 202-203, 207). He testified the registration numbers had "been scraped or peeled off[,]" and that "they looked like they'd been off for years." (RP 208-209). He testified Mr. Hankins told him he purchased the jet ski in Spokane. (RP 204, 215).

The trial court instructed the jury on the lesser-included offense of second degree trafficking in stolen property. (CP 109, 117, 119-122; RP 293). The to-convict instruction for this offense instructed the jury that in order to convict Mr. Hankins, it had to find each of the following elements had been proved beyond a reasonable doubt:

> (1) That on or about October 8, 2016, the defendant recklessly trafficked in stolen property with reckless disregard of whether the property was stolen; and
> (2) That this act occurred in the State of Washington.

(CP 117; RP 293).

The jury was given a jury instruction defining "traffic." (CP 116).

The jury found Mr. Hankins not guilty of first degree trafficking in stolen property. (CP 123; RP 351). The jury found Mr. Hankins guilty of the lesser-included offense of second degree trafficking in stolen property. (CP 124, 138-151; RP 351).

Prior to sentencing, the State asserted that Mr. Hankins had an offender score of three, based upon "two felonies out of Washington and one out of Oregon." (RP 353). Defense counsel responded "[w]e agree to the criminal history." (RP 353). The State did not submit certified copies of his prior Judgment and Sentences. (RP 352-353, 356-378). The trial court's written order setting sentencing states "Mr. Hankins stipulates to an offender score of 3." (CP 125).

At the sentencing hearing, trial court sentenced Mr. Hankins based upon an offender score of three, which included an Oregon conviction for Unlawful Possession of Marijuana, with a date of crime of June 30, 2011. (CP 140, 142; RP 356, 369-378). The trial court did not conduct a comparability analysis to determine whether the Oregon conviction was comparable to a Washington offense. (RP 356-378). Defense counsel did not object to the trial court not conducting a comparability analysis. (RP 356-378).

Defense counsel did not object to the imposition of legal financial obligations (LFOs), stating "we've got no - - objections to the imposition of the LFOs that you would normally impose, [Mr. Hankins] being an able-bodied individual and able to pay them." (RP 363). Mr. Hankins informed the trial court he operated a mobile mechanic business. (RP 366).

The trial court ruled "I will impose the legal / financial obligations that were requested by the state, because you're not asserting any claim of indigency."

(RP 372). The trial court imposed the following legal financial obligations: $500 victim assessment; $200 court costs; $50 jail booking fee; $250 court-appointed attorney fee; and $100 felony DNA collection fee. (CP 144-145; RP 358, 372).

The Judgment and Sentence contains the following boilerplate language: "[a]n award of costs on appeal against the defendant may be added to the total legal financial obligations." (CP 146).

Mr. Hankins timely appealed. (CP 155-169). The trial court entered an Order of Indigency, granting Mr. Hankins a right to review at public expense. (CP 170-173).

E. ARGUMENT

Issue 1: Whether the trial court erred in finding Mr. Hankins guilty of second degree trafficking in stolen property, where the evidence was insufficient to prove the crime as charged in the Information.

There was insufficient evidence to support Mr. Hankins' conviction of second degree trafficking of stolen property, because the evidence presented at trial did not establish that Mr. Hankins trafficked in the stolen property charged in the information, a "1990 Yamaha BombardierJet Ski." The evidence presented at trial did not establish that Mr. Hankins trafficked a "1990 Yamaha BombardierJet Ski." At most, the evidence established Mr. Hankins trafficked a "Sea Doo Bombardier" jet ski of an unknown year. A rational jury could not have found Mr. Hankins guilty of the crime as charged in the Information. Therefore, the

evidence is insufficient to support Mr. Hankins' conviction of second degree trafficking in stolen property.

In every criminal prosecution, due process requires that the State prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id*. (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Furthermore, "[a] claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id*. (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980)).

"Circumstantial evidence and direct evidence are equally reliable." *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Circumstantial evidence "is sufficient if it permits the fact finder to infer the finding beyond a reasonable doubt." *State v. Askham*, 120 Wn. App. 872, 880, 86 P.3d 1224 (2004) (citing *State v. King*, 113 Wn. App. 243, 270, 54 P.3d 1218 (2002)). The appellate court "defer[s] to the trier of fact on issues of conflicting testimony, credibility of

witnesses, and the persuasiveness of the evidence." *Thomas*, 150 Wn.2d at 874-875.

"[A] criminal defendant may always challenge the sufficiency of the evidence supporting a conviction for the first time on appeal." *State v. Sweany*, 162 Wn. App. 223, 228, 256 P.3d 1230 (2011), *aff'd*, 174 Wn.2d 909, 281 P.3d 305 (2012) (citing *State v. Hickman*, 135 Wn.2d 97, 103 n. 3, 954 P.2d 900 (1998)); *see also* RAP 2.5(a)(2) (stating "a party may raise the following claimed errors for the first time in the appellate court . . . failure to establish facts upon which relief can be granted. . . ."). "A defendant challenging the sufficiency of the evidence is not obliged to demonstrate that the due process violation is 'manifest.'" *Id*.

The remedy for insufficient evidence to prove a crime is reversal, and retrial is prohibited. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005).

To find Mr. Hankins guilty of second degree trafficking in stolen property, the jury had to find that he recklessly trafficked in stolen property, with reckless disregard of whether the property was stolen. (CP 117; RP 293); *see also* RCW 9A.82.055 (defining second degree trafficking in stolen property). "Traffic" was defined for the jury as follows:

> "Traffic" means: to sell or otherwise dispose of stolen property to another person or to possess stolen property, with intent to sell or otherwise dispose of the property to another person.

(CP 116); *see also* RCW 9A.82.010(19) (defining "traffic").

The Information alleged that Mr. Hankins trafficked one item of stolen property, a "1990 Yamaha BombardierJet Ski." (CP 1-2).

"[A] defendant has the right to be informed of the charges against him and to be tried only for the offenses charged." *State v. Peterson*, 133 Wn.2d 885, 889, 948 P.2d 381 (1997).

Here, Mr. Reynolds testified the jet ski that was stolen from in front of his home, and that Mr. Hankins attempted to sell on Craigslist, was a "Sea Doo Bombardier" jet ski of an unknown year. (RP 65-67). Mr. Hankins was not charged with trafficking this item, but rather, he was charged with trafficking a "1990 Yamaha BombardierJet Ski." (CP 1-2). Because Mr. Hankins was not charged with trafficking a "Sea Doo Bombardier" jet ski of an unknown year, it was improper to ask the jury to consider evidence of trafficking this property, as proof of the second degree trafficking in stolen property count. *See Peterson*, 133 Wn.2d at 889; *see also State v. Goldsmith*, 147 Wn. App. 317, 325, 195 P.3d 98 (2008) (the State charged one crime but proved another to the jury; a second prosecution was prohibited, because "[t]he problem is not a defective pleading or a lack of notice[,]" but rather, "a failure of proof of the essential elements of the crime charged."). The State failed to prove the crime as it was specifically charged, trafficking a "1990 Yamaha BombardierJet Ski." (CP 1-2).

In *State v. McGary*, the appellant challenged the sufficiency of the evidence to support his juvenile court conviction of taking a motor vehicle

without permission. *State v. McGary*, 37 Wn. App. 856, 857-860, 683 P.2d 1125 (1984). The appellant argued, in relevant part, "that the State failed to prove the motor vehicle taken was the one alleged in the information." *Id*. at 859. The information alleged the appellant took a specific motor vehicle, "a 1972 Yamaha Motorcycle VIN # R-5004275." *Id*. At trial, the alleged victim testified he owned an inoperable 1972 Yamaha motorcycle; another witness testified the appellant took the inoperable motorcycle; and the appellant testified "he took the Yamaha motorcycle with loose gears." *Id*. at 859-60. Based upon this testimony, the court found the trier of fact could have found the appellant took the motor vehicle charged in the information. *Id*. at 860. The court reasoned "[t]he inclusion of the VIN was merely surplusage and did not make the content of the phrase an element of the crime." *Id*.

Here, unlike *McGary*, the trier of fact could not have found Mr. Hankins trafficked the specific property charged in the Information. *See McGary*, 37 Wn. App. at 859-60. There, the information charged a specific brand of motorcycle and year, and the testimony at trial identified this specific brand (Yamaha) and year (1972). *See id*. Here, the Information charged a specific brand and year of jet ski, and the testimony at trial did not identify this specific brand (Yamaha) and year (1990), but to the contrary, a different brand of jet (Sea Doo) with an unknown year. (CP 1-2; RP 65-77). Given the testimony presented at trial, the

trier of fact could not have found Mr. Hankins trafficked the property charged in the information. (CP 1-2; RP 65-77).

Based on the foregoing, a rational jury could not have found Mr. Hankins guilty of second degree trafficking in stolen property. *See Salinas*, 119 Wn.2d at 201 (citing *Green*, 94 Wn.2d at 220-22). His conviction for second degree trafficking in stolen property should be reversed and dismissed with prejudice. *See Smith*, 155 Wn.2d at 505 (stating this remedy); *see also Goldsmith*, 147 Wn. App. at 326 (where the State charges one crime and proves another, it is prohibited, under the constitutional prohibitions against double jeopardy, from amending the information to again prove the same crime it already proved).

Issue 2: In the alternative, whether the to-convict jury instruction for second degree trafficking in stolen property was defective because it allowed Mr. Hankins to be convicted of a crime not charged in the Information.

Mr. Hankins requests this Court consider this argument, made in the alternative, if it rejects his sufficiency of the evidence argument presented in Issue 1 above. The to-convict instruction given here was defective because it allowed Mr. Hankins to be convicted of a crime not charged in the information. The information charged Mr. Hankins with trafficking a "1990 Yamaha BombardierJet Ski." However, the to-convict instruction allowed the jury to find Mr. Hankins guilty for trafficking in "stolen property" in general. During trial, the trial court admitted evidence involving property other than the jet ski listed in the information. Because the jury could have returned a guilty verdict by finding

that Mr. Hankins committed an act not charged in the information, the to-convict jury instruction was defective. This error was not harmless. Mr. Hankins' conviction should be reversed and remanded for a new trial.

"An accused person has a constitutional right to be informed of the charge he is to meet at trial and cannot be tried for a crime not charged." *State v. Jain*, 151 Wn. App. 117, 121, 210 P.3d 1061 (2009) (citing *State v. Pelkey*, 109 Wn.2d 484, 487, 745 P.2d 854 (1987)); *see also* U.S. Const. amend. VI; Const. art. I, § 22. If a to-convict jury instruction allows a jury to convict a defendant of a crime not charged in the information, the instruction is defective. *See Jain*, 151 Wn.. App. at 121-24; *State v. Brown*, 45 Wn. App. 571, 574-77, 726 P.2d 60 (1986); *State v. Farzad*, No. 74538-7-I, 2017 WL 1055729, at *3-4 (Wash. Ct. App. Mar. 20, 2017); *see also* GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013, as nonbinding authority).

Mr. Hankins challenges the to-convict instruction on this basis for the first time on appeal. Because it is a manifest error affecting a constitutional right, it may be raised for the first time in appeal. *See* RAP 2.5(a)(3); *see also Farzad*, 2017 WL 1055729, *3 (allowing the defendant to argue, for the first time on appeal, that to-convict instructions allow the jury to convict him of an uncharged offense); *see also* GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013, as nonbinding authority).

The constitutional rights at issue are Mr. Hankins' "right to notice and a fair opportunity to present a defense." *Jain*, 151 Wn. App. at 124. The error is manifest, because it prejudiced Mr. Hankins; the record shows that the to-convict instruction allowed the jury to convict him of an uncharged offense. *See State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009) (stating "'[m]anifest' in RAP 2.5(a)(3) requires a showing of actual prejudice.").

In *Brown*, the defendant was charged with and convicted of conspiracy to commit theft in the first degree. *Brown*, 45 Wn. App. at 573. The information charged a conspiracy that was comprised of 12 named individuals. *Id*. at 576. However, the to-convict instruction "required only that the jury find that the defendant had agreed with 'one or more persons to engage in or cause the performance of conduct constituting the crime of theft in the first degree.'" *Id.*

On appeal, the defendant argued the to-convict instruction allowed him to be convicted of a crime not charged in the information. *Id*. at 574. He argued this instruction "allows him to be convicted of conspiring with someone other than the persons named in the information." *Id*. The court agreed that the jury was improperly instructed. *Id*. at 575-577. The court reasoned "[s]ince testimony at trial indicated that there were others involved in the conspiracy besides those named in the information, the jury may have convicted the defendant after finding an agreement between him and someone not charged." *Id*. at 576. The court held "[s]ince an accused must be informed of the charge against him and cannot be

tried for an offense not charged . . . the instruction was defective." *Id*. The court reversed the defendant's conviction and remanded the case for a new trial. *Id*. at 576, 580.

In *Jain*, the defendant was charged with and convicted of two counts of money laundering. *Jain*, 151 Wn. App. at 120-23. Each money laundering charge was linked to a parcel of real property, specifically identified in the information. *Id*. at 122-23. However, the to-convict instructions, "in contrast to the information, did not require the State to prove or the jury to find that [the defendant's] money laundering involved any specific properties." *Id*. at 123-24. And, "no instruction asked the jury to unanimously decide which property's disposition made up the crime of money laundering." *Id*. at 124. During trial, the trial court admitted evidence involving real property other than the two parcels specifically identified in the information. *Id*. at 123.

On appeal, the defendant argued the two to-convict instructions allowed him to be convicted of crimes not charged in the information. *Id*. at 121. The State conceded error, and the court accepted the concession, stating "[t]he State properly concedes that it violated [the defendant's] right to notice and a fair opportunity to present a defense." *Id*. at 121, 124. The court reasoned "[a]s in *Brown*, the jury in this case could have returned a guilty verdict by finding that [the defendant] committed acts not charged in the information, specifically acts relating to properties other than the [two parcels of real property listed in the

information]." *Id*. at 124. The court reversed the defendant's convictions and remanded the case for a new trial. *Id*.

Here, Mr. Hankins was charged with trafficking a specific item of property, a "1990 Yamaha BombardierJet Ski." (CP 1-2). However, the to-convict instruction allowed the jury to find Mr. Hankins guilty for trafficking in stolen property in general, rather than trafficking the specific item of property listed in the information. (CP 1-2, 117; RP 293). The to-convict instruction instructed the jury that in order to convict Mr. Hankins, it had to find each of the following elements had been proved beyond a reasonable doubt:

> (1) That on or about October 8, 2016, the defendant recklessly *trafficked in stolen property* with reckless disregard of whether the property was stolen; and
> (2) That this act occurred in the State of Washington.

(CP 117; RP 293) (emphasis added).

Like in *Brown* and *Jain*, the to-convict instruction given here was defective because it allowed Mr. Hankins to be convicted of a crime not charged in the information. *See Brown*, 45 Wn. App. at 574-77; *Jain*, 151 Wn. App. at 120-24. During trial, the trial court admitted evidence involving property other than the specific item of property listed in the information: a "Sea Doo Bombardier" jet ski of an unknown year, as opposed to the property charged, a "1990 Yamaha BombardierJet Ski." (CP 1-2; RP 65-67). Mr. Reynolds testified the jet ski that was stolen from in front of his home, and that Mr. Hankins attempted to sell on Craigslist, was a "Sea Doo Bombardier" jet ski of an

unknown year. (RP 65-67). The jury could have returned a guilty verdict by finding that Mr. Hankins committed an act not charged in the information, specifically acts relating to property other than the "1990 Yamaha BombardierJet Ski" charged in the information, a "Sea Doo Bombardier" jet ski of an unknown year. *See Jain*, 151 Wn. App. at 124. Therefore, the to-convict jury instruction was defective. *See Brown*, 45 Wn. App. at 574-77; *Jain*, 151 Wn. App. at 120-24; *see also Farzad*, 2017 WL 1055729, at *3-4 (finding to-convict instructions for telephone harassment defective, where the information alleged calls made to two specific people; the jury had evidence of calls made to three people; and the to-convict instructions did not list the two specific people charged, but rather "another person" generally); GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013, as nonbinding authority).

Furthermore, the defective to-convict instruction given here was not harmless. "An erroneous instruction given on behalf of a party in whose favor the verdict was returned is presumed prejudicial unless it affirmatively appears that the error was harmless." *Jain*, 151 Wn. App. at 121. "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." *Id*. at 121-22 (citing *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985)). "An instructional error was harmless only if it was trivial, or formal, or merely

academic, was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case. *Brown*, 45 Wn. App. at 576 (citing *State v. Rice*, 102 Wn.2d 120, 123, 683 P.2d 199 (1984)).

The to-convict instruction required proof that Mr. Hankins trafficked in "stolen property." (CP 117; RP 293). The jury instructions did not limit the jury's consideration to the charged crime (trafficking a "1990 Yamaha BombardierJet Ski"), or require the jury to agree on what was the "stolen property." On this record, it is not clear beyond a reasonable doubt that any reasonably jury would have reached the same result if the instructions were not defective. *See Jain*, 151 Wn. App. at 121-22 (citing *Guloy*, 104 Wn.2d at 425). Therefore, the error was not harmless.

The to-convict jury instruction for second degree trafficking in stolen property was defective because it allowed Mr. Hankins to be convicted of a crime not charged in the Information. This error was not harmless. Therefore, Mr. Hankins' conviction should be reversed and remanded for a new trial. *See Brown*, 45 Wn. App. at 576, 580; *Jain*, 151 Wn. App. at 124 (setting forth this remedy).

Issue 3: Whether Mr. Hankins was denied his right to effective assistance of counsel when his attorney failed to object to the inclusion of a prior out-of-state conviction in his offender score without a comparability analysis.

Mr. Hankins offender score was calculated as a "3" based in part on the inclusion of one point for an Oregon conviction for Unlawful Possession of Marijuana. (CP 125, 140, 142; RP 352-353, 356-378). Defense counsel was

ineffective for failing to request a comparability analysis prior to the court counting this offense in Mr. Hankins' offender score. This case must now be remanded for resentencing in order to conduct the required comparability analysis, as it is impossible to conduct either the required legal or factual analysis on the existing record.

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5(a)(3). The claim is reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To establish ineffective assistance of counsel, a defendant must prove the following two-prong test:

> (1) [D]efense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (*citing State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

Under the Sentencing Reform Act of 1981 (SRA), a defendant's offender score establishes his standard range sentence. RCW 9.94A.525 and .530(1). "To

properly calculate a defendant's offender score, the SRA requires that sentencing courts determine a defendant's criminal history based on his or her prior convictions and the level of seriousness of the current offense." *State v. Ross*, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004) (citing *State v. Wiley*, 124 Wn.2d 679, 682, 880 P.2d 983 (1994)).

In order for prior out-of-state convictions to be included in a defendant's offender score, the SRA requires that the "[o]ut-of-state convictions . . . be classified according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525(3).

"Washington law employs a two-part test to determine the comparability of a foreign offense." *State v. Thiefault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). First, the sentencing court must determine whether the foreign conviction is legally comparable, by asking "whether the elements of the foreign offense are substantially similar to the elements of the Washington offense." *Id*. Second, "[i]f the elements of the foreign offense are broader than the Washington counterpart, the sentencing court must determine whether the offense is factually comparable – that is, whether the conduct underlying the foreign offense would have violated the comparable Washington statute." *Id*. (citing *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998)). "In making its factual comparison, the sentencing court may rely on facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt." *Id*. It is the State's burden

to prove, by a preponderance of the evidence, the comparability of a defendant's prior out-of-state conviction. *Ross*, 152 Wn.2d at 230.

In *Thiefault*, our Supreme Court held the failure to object to a deficient comparability analysis of a prior Montana conviction constituted ineffective assistance of counsel. *Thiefault*, 160 Wn.2d at 417. The Court found the defendant's attorney provided deficient representation under the first prong of the *Strickland* test when he did not object to the sentencing court's inadequate comparability analysis. *Id*.; *see also Strickland*, 466 U.S. at 687. The Court reasoned the prior Montana conviction was not legally or factually comparable to a Washington offense. *Id*. The Montana conviction was not legally comparable, because the Montana statute at issue was broader than its Washington counterpart. *Id*. And, the documents submitted by the State at sentencing were insufficient to establish factual comparability. *Id*.

The *Thiefault* Court further found the defendant was prejudiced by his attorney's deficient representation, because "[a]lthough the State may have been able to obtain a continuance and produce the information to which [Mr.] Thiefault pleaded guilty, it is equally as likely that such documentation may not have provided facts sufficient to find the Montana and Washington crimes comparable . . ." 160 Wn.2d at 417. The Court vacated Mr. Thiefault's sentence and remanded the case to the trial court to determine whether the Montana conviction was factually comparable to a Washington offense. *Id*. at 417, 420.

In an unpublished opinion, this Court recently reversed and remanded for resentencing where the trial court failed to conduct a comparability analysis before counting four prior California convictions toward the defendant's offender score. *State v. Navarette*, No. 31823-1-III, 2014 WL 4723168, at *1 (Wash. Ct. App. Sept. 23, 2014); *see also* GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013, as nonbinding authority).

The Court and the parties agreed, "factual questions of the comparability of the four challenged out-of-state convictions should be considered by a sentencing court on remand." *Id*. The Court did not conduct a legal comparability analysis of the California offenses and instead remanded for the trial court to conduct a comparability analysis, due to the insufficient record. *Id*. Following the decision in *Thiefault,* and the statutory requirement in RCW 9.94A.525(3), this Court held defense counsel was ineffective when he did not object to the sentencing court's lack of a comparability analysis. *Id*.; *see also Thiefault,* 160 Wn.2d at 417.

Here, as in *Thiefault* and *Navarette,* Mr. Hankins received ineffective assistance of counsel when his defense attorney failed to object to the inclusion of one point in his offender score that was based on his Oregon conviction for Unlawful Possession of Marijuana. *See Thiefault,* 160 Wn.2d at 417; *Navarette*, 2014 WL 4723168, at *1. Given the record, remand is the only appropriate

remedy at this time, as it is impossible to begin a proper legal or factual comparability analysis on the existing record.

It is not clear from the existing record that the Oregon Unlawful Possession of Marijuana conviction is legally comparable to a Washington offense. The conviction was briefly mentioned twice on the record. (RP 353, 356). Prior to sentencing, the State asserted that Mr. Hankins had one felony out of Oregon. (RP 353). At the sentencing hearing, the conviction was described as an Oregon conviction for Unlawful Possession of Marijuana, a felony, from 2011. (RP 356). The conviction was listed in Mr. Hankins' judgment and sentence as "Unlawful Possession of Marijuana," with a date of crime of June 30, 2011, though no particular Oregon statute was cited. (CP 140). The record does not indicate what statutory offense was actually committed by Mr. Hankins to establish this prior conviction.

Without knowing which particular Oregon offense Mr. Hankins is supposed to have committed, it is quite impossible to attempt to engage in the required legal comparability analysis at this time. Furthermore, in 2011, the Oregon statute prohibiting possession of marijuana was broader than its Washington counterpart. *Compare* O.R.S. § 475.864 (2011) (unlawful possession of marijuana in an amount of one avoirdupois ounce or more is a felony) *with* RCW 69.50.4013 (2011) (possession of a controlled substance is a felony, except as provided in RCW 69.50.4014) *and* RCW 69.50.4014 (2011) (stating "any

person found guilty of possession of forty grams or less of marihuana is guilty of a misdemeanor.").

For possession of marijuana in Oregon to be a felony, the amount of marijuana possessed had to be one ounce or more. *See* O.R.S. § 475.864 (2011). For possession of marijuana in Washington to be felony, the amount of marijuana possessed had to be 40 grams or more. *See* RCW 69.50.4013 (2011); RCW 69.50.4014 (2011). Because one ounce is less than 40 grams, possession of marijuana in Oregon between one ounce and 40 grams could be a felony, when it would only be a misdemeanor in Washington. *See* O.R.S. § 475.864 (2011); RCW 69.50.4013 (2011); RCW 69.50.4014 (2011).

In addition, there were no facts introduced below regarding the Oregon conviction, so it is impossible to conduct a factual comparability analysis. Like in *Navarette*, the only fair course of action at this time is to remand to the trial court to conduct the requisite comparability analysis. *See Navarette*, 2014 WL 4723168, at *1.

Defense counsel's failure to object to the inclusion of the Oregon conviction for Unlawful Possession of Marijuana in his offender score prejudiced Mr. Hankins. It was equally likely any documentation obtained by the State may or may not have provided proof sufficient to find this offense comparable to a Washington offense. *See Thiefault*, 160 Wn.2d at 417. If the documentation would not provide facts sufficient to find the Oregon offense legally or factually

comparable to a Washington offense, Mr. Hankins' offender score would have been lower. In other words, the results of the sentencing proceeding would have been different. *McFarland*, 127 Wn.2d at 334-35 (citing *Thomas*, 109 Wn.2d at 225- 26). Defense counsel's failure to challenge the lack of a comparability analysis or alert the trial court to its duty to conduct that analysis deprived Mr. Hankins of his constitutional right to effective assistance of counsel. Because a comparability analysis could have changed Mr. Hankins' score, Mr. Hankins has demonstrated sufficient prejudice to require reversal of this matter for resentencing.

Ultimately, the State did not provide any underlying judgment and sentence on the Oregon conviction. The State did not supply any information to the trial court with regard to the facts underlying this conviction. It is impossible for this Court to substitute into the position of the trial court and conduct either a legal or factual comparability analysis on the existing record. The sentencing court's failure to conduct the comparability analysis required by the SRA deprived Mr. Hankins of due process under the Fourteenth Amendment to the United States Constitution and Wash. Const. art. I, § 3, and deprived him of his constitutional right to effective assistance of counsel. Mr. Hankins should be resentenced to determine his accurate offender score following a comparability analysis. *See Thiefault*, 160 Wn.2d at 417, 420 (setting forth this remedy).

Issue 4: Whether this Court should deny costs against Mr. Hankins on appeal in the event the State is the substantially prevailing party.

Mr. Hankins preemptively objects to any appellate costs being imposed against him, should the State be the prevailing party on appeal, pursuant to the recommended practice in *State v. Sinclair*, 192 Wn. App. 380, 385-94, 367 P.3d 612 (2016), this Court's General Court Order issued on June 10, 2016, and RAP 14.2 (amended effective January 31, 2017).

An order finding Mr. Hankins indigent was entered by the trial court, and there has been no known improvement to this indigent status. (CP 170-173). To the contrary, Mr. Hankins' report as to continued indigency, filed in this Court on the same day as this opening brief, shows that Mr. Hankins remains indigent. In addition, the report shows that Mr. Hankins' financial circumstances have declined since the date he was sentenced in this case. (RP 363, 366, 372). Although Mr. Hankins informed the sentencing court that he operated a mobile mechanic business, his report as to continued indigency shows that he has no income other than basic food (SNAP) public benefits. (RP 366). The report also shows that Mr. Hankins has outstanding debts.

The imposition of costs under the circumstances of this case would be inconsistent with those principles enumerated in *Blazina*. *See State v. Blazina*, 182 Wn.2d 827, 835, 44 P.3d 680 (2015). In *Blazina*, our Supreme Court recognized the "problematic consequences" LFOs inflict on indigent criminal defendants. *Blazina*, 182 Wn.2d at 835-37. To confront these serious problems,

the Court emphasized the importance of judicial discretion: "The trial court must decide to impose LFOs and must consider the defendant's current or future ability to pay those LFOs based on the particular facts of the defendant's case." *Blazina*, 182 Wn.2d at 834. Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." *Id.*

The *Blazina* Court addressed LFOs imposed by trial courts, but the "problematic consequences" are every bit as serious with appellate costs. The appellate cost bill imposes a debt for losing an appeal, which then "become[s] part of the trial court judgment and sentence." RCW 10.73.160(3). Imposing thousands of dollars on an indigent appellant after an unsuccessful appeal results in the same compounded interest and retention of court jurisdiction. Appellate costs negatively impact indigent appellants' ability to successfully rehabilitate in precisely the same ways the *Blazina* court identified for trial costs.

Although *Blazina* applied the trial court LFO statute, RCW 10.01.160, it would contradict and contravene our High Court's reasoning not to require the same particularized inquiry before imposing costs on appeal. Under RCW 10.73.160(3), appellate costs automatically become part of the judgment and sentence. To award such costs without determining ability to pay would circumvent the individualized judicial discretion *Blazina* held was essential before imposing monetary obligations. This is particularly true where, as here, Mr.

Hankins has demonstrated his indigency and current and future inability to pay costs. (CP 170-173). In addition, as set forth above, it is not proper to defer the required ability to pay inquiry to the time the State attempts to collect costs, as suggested by the trial court in this case. *See Blazina*, 182 Wn.2d at 832, n.1. Mr. Hankins would be burdened by the accumulation of significant interest and would be left to challenge the costs without the aid of counsel. RCW 10.82.090(1) (interest-bearing LFOs); RCW 10.73.160(4) (no provision for appointment of counsel); RCW 10.01.160(4) (same); *State v. Mahone*, 98 Wn. App. 342, 346-47, 989 P.2d 583 (1999) (because motion for remission of LFOs is not appealable as matter of right, "Mahone cannot receive counsel at public expense"). The trial court is required to conduct an individualized inquiry prior to imposing the costs, not prior to the State's collection efforts. *See State v. Lundy*, 176 Wn. App. 96, 103, 308 P.3d 755 (2013); RCW 10.01.160(3); *Blazina*, 182 Wn.2d 827.

Furthermore, the *Blazina* court instructed *all* courts to "look to the comment in GR 34 for guidance." *Blazina*, 182 Wn.2d at 838. That comment provides, "The adoption of this rule is rooted in the constitutional premise that *every level of court* has the inherent authority to waive payment of filing fees and surcharges on a case by case basis." GR 34 cmt. (emphasis added). The *Blazina* court said, "if someone does meet the GR 34[(a)(3)] standard for indigency, courts should seriously question that person's ability to pay LFOs." *Blazina*, 182 Wn.2d at 839. Mr. Hankins met this standard for indigency. (CP 170-173).

In addition, Mr. Hankins' report as to continued indigency states that he receives basic food (SNAP) public benefits. In *Blazina*, our Supreme Court stated:

> [W]hen determining a defendant's ability to pay . . . Courts should also look to the comment in court rule GR 34 for guidance. This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, *such as Social Security or food stamps* . . . Although the ways to establish indigent status remain nonexhaustive . . . *if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs*.

Blazina, 182 Wn.2d at 838-39 (internal citations omitted) (emphasis added).

Because Mr. Hankins currently receives food stamps, the record demonstrates he is indigent and does not have the ability to pay costs on appeal. *See id.*

This Court receives orders of indigency "as a part of the record on review." RAP 15.2(e); CP 170-173. "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent." RAP 15.2(f). This presumption of continued indigency, coupled with the GR 34(a)(3) indigency standard, requires this Court to "seriously question" this indigent appellant's ability to pay costs assessed in an appellate cost bill. *Blazina,* 182 Wn.2d at 839.

It does not appear to be the burden of Mr. Hankins to demonstrate his continued indigency given the newly amended RAP 15.2, since his indigency is presumed to continue during this appeal. Nonetheless, Mr. Hankins' report as to continued indigency, filed in this Court on the same day as this opening brief, shows that Mr. Hankins remains indigent.

This Court is asked to deny appellate costs at this time. RCW 10.73.160(1) states the "supreme court . . . may require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." *Staats v. Brown*, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). *Blank*, too, recognized appellate courts have discretion to deny the State's requests for costs. *State v. Blank*, 131 Wn.2d 230, 252-53, 930 P.2d 1213 (1997). Pursuant to RAP 14.2, effective January 31, 2017, this Court, a commissioner of this court, or the court clerk are now specifically guided to deny appellate costs if it is determined that the offender does not have the current or likely future ability to pay such costs. RAP 14.2. Importantly, when a trial court has entered an order that the offender is indigent for purposes of the appeal, that finding of indigency remains in effect pursuant to RAP 15.2(f), unless the commissioner or court clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency. *Id.*

There is no evidence Mr. Hankins' current indigency or likely future ability to pay has significantly improved since the trial court entered its order of indigency in this case. And, to the contrary, there is a completed report as to continued indigency showing that Mr. Hankins remains indigent.

Appellate costs should not be imposed in this case.

F. CONCLUSION

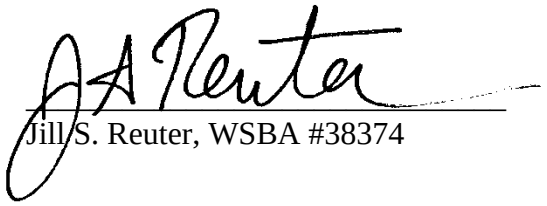
The evidence presented at trial was insufficient to find Mr. Hankins guilty of second degree trafficking in stolen property. His conviction should be reversed and the charge dismissed with prejudice.

In the alternative, Mr. Hankins' conviction should be reversed and remanded for a new trial, because the to-convict instruction for second degree trafficking in stolen property erroneously allowed the jury to convict Mr. Hankins of a crime not charged in the Information, and this error was not harmless.

At a minimum, this matter should be remanded for resentencing to require the trial court to conduct a comparability analysis before counting the Oregon conviction in Mr. Hankins' offender score.

Mr. Hankins also asks this Court to deny the imposition of any costs against him on appeal.

Respectfully submitted this 19th day of January, 2018.



Jill S. Reuter, WSBA #38374

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

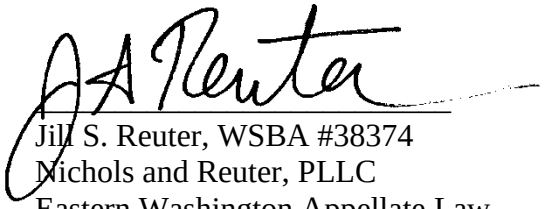
STATE OF WASHINGTON	)	
Plaintiff/Respondent	)	COA No. 35497-1-III
vs.	)	Stevens Co. No. 16-1-00233-6
	)	
BENJAMIN ALEXANDER HANKINS	)	PROOF OF SERVICE
	)	
Defendant/Appellant	)	
	)	

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on January 19, 2018, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Benjamin Alexander Hankins, Inmate
Stevens County Jail
PO Box 186
Colville, WA 99114

Having obtained prior permission from the Stevens County Prosecutor's Office, I also served a copy of the same on Timothy Rasmussen at trasmussen@co.stevens.wa.us using the Washington State Appellate Courts' Portal.

Dated this 19th day of January, 2018.



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